IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

CRL.A.No. 458 of 2006()

SC.347/2005 of SPL.COURT (NDPS ACT CASES), THIRUVANANTHAPURAM

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APPELLANTS: ACCUSED:

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1. SELVAKUMAR, S/O. ARTHUR,
   4/42, CAULDWELL COLONY, II STREET, TUTICORIN.

2. R. GEORGE, S/O. RATHNAM,
   RESIDING AT 6-E, SELVARAJAN, 1ST STREET,
   TUTICORIN-2, TAMILNADU.

BY ADV.S SRI.K.C.PETER
SRI.K.PRAVEEN KUMAR

RESPONDENT: COMPLAINANT:

THE INTELLIGENCE OFFICER,
NARCOTIC CONTROL BUREAU,REGIONAL INTELLIGENCE UNIT
THIRUVANANTHAPURAM, REP. BY SPECIAL PROSECUTOR.

BY SPL. PUBLIC PROSECUTOR SRI.C.P.UDAYABHANU

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 04/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A.NO.2073 OF 2006 IN CRL. APPEAL NO.458 OF 2006.

DISMISSED

4.7.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 458 OF 2006

Dated this the 4th day of July, 2007

JUDGMENT

The appellants are the accused in S.C. No.347 of 2005 on the file of the Special Judge (trial of cases under the N.D.P.S. Act), Thiruvananthapuram. They faced trial for the offences punishable under Sections 21(c). 23(c), 28 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "N.D.P.S. Act").

2. The prosecution case against the appellants is that on 28.10.2004, on getting secret information, the Intelligence Officer attached to the Narcotic Control Bureau Office, Thiruvananthapuram (for short "the N.C.B. Office) along with other N.C.B. officials proceeded to the K.S.R.T.C. bus station premises, Thiruvananthapuram and found both the accused in a white ambassador car bearing Registration No.KL-01-A 4079 with 5 Kgs. of heroin packed in two polythene bags concealed in a false cavity fabricated beneath the front seat of the car driven by the first accused. It is the further case of the prosecution that both the accused entered into a criminal conspiracy with one Mohammed of Kasaragode and one Rex of Sri Lanka for the procurement and smuggling of heroin to Sri Lanka. The prosecution further alleged that the Intelligence Officer tested

the contents of both the packets by using a field Drug Detection Kit and found that the first packet contained 2600 grams of heroin and the second packet contained 2680 grams of heroin and that after taking two samples from each packets, the packets were sealed. Thereafter, the statements of both the accused were recorded under Section 67 of the N.D.P.S. Act, they were placed under arrest and produced before the Magistrate' Court and the samples collected from the packets were sent for chemical analysis. To prove the case against the accused, the prosecution examined PWs.1 to 7 and produced Exts.P1 to P22 as well as MOs.1 to 7. On the side of the defence DWs.1 and 2 were examined and Exts.D1 to D4 were produced. Ext.C1 is the court exhibit and Ext.X1 is the document produced by the witness. On closing the prosecution evidence, the accused were questioned under Section 313 Cr.P.C. Both the accused denied their involvement in the case. The first accused stated that on 28.10.2004 at about 8 a.m. he came to the K.S.R.T.C. bus station at Thampanoor to see a car broker named Selvaraj for the purpose of purchasing a car and that while he was with Selvaraj, the N.C.B. officials approached them and took him to the N.C.B. office where he was subjected to manhandling and made to sign a number of papers . The second accused in his 313 Cr.P.C. statement stated that he was taken into custody by the N.C.B. officials on 29.10.2004 at about 7.30 a.m. from his residential house at Tuticorin. He

further stated that he was brought to the N.C.B. office at Thiruvananthapuram and made to sign certain papers under threat and coercion. After considering the entire evidence, the trial court found both the accused guilty under Sections 21(c) and 29 of the N.D.P.S. Act, convicted them thereunder and sentenced them to undergo rigorous imprisonment for fifteen years each and to pay a fine of Rs. one lakh each under Section 21(c) and in default of payment of fine, to undergo rigorous imprisonment for a further period of two years each. No separate sentence was awarded under Section 29 of the N.D.P.S. Act. Set off was also allowed under Section 428 Cr.P.C. Both the accused were found not guilty under Sections 23(c) and 28 of the N.D.P.S. Act. The above conviction and sentence are challenged in this appeal.

3. This Court heard Sri. M. Retna Singh, the learned senior counsel appearing for the appellants as well as Sri. C.P. Udayabhanu, Special Public Prosecutor appearing for the respondent.

4. Sri. M. Retna Singh, learned senior counsel appearing for the appellants has taken three contentions : (i) the identity of the first accused - first appellant herein has not been established by the prosecution beyond reasonable doubt as it is seen from Ext.P5 mahazar that the N.C.B.

officials arrested one Selvaraj whereas the name of the first accused in Selvakumar, (ii) no evidence was adduced by the prosecution to prove that the articles seized or the samples analysed were heroin and (iii) even accepting the evidence of PW.2 and Ext.P14 chemical analysis report, it is not possible to hold that the appellants committed the offence punishable under Section 21(c) of the N.D.P.S. Act as there was no evidence to show that the sample was analysed by applying scientific methods to find out the purity of the sample or the percentage of diacetylmorphine in the sample. To substantiate this contention, learned senior counsel placed reliance on the decision of the Apex Court reported in **State of Rajasthan v. Daulat Ram, A.I.R. 1980 S.C. 1314**, judgment of this Court reported in **Noushad K.K. v. Intelligence Officer, Narcotics Control Bureau, I.L.R. 2007(2) Kerala 485** and a decision of the Madras High Court reported in **State by Intelligence Officer, NCB, South Zone, Madras v. P. Raja Singh, 1994(1) Crimes 990**.

5. Before proceeding with the contentions raised by the learned senior counsel appearing for the appellants, it is advantageous to consider the prosecution allegation and the evidence adduced in the case. It is the specific case of the prosecution that the seizure effected from the accused persons was heroin. The prosecution also relied on Ext.P14 chemical

analysis report in this regard. The detecting officer was examined as PW.1. He deposed before the court below that on getting secret information, he reported the matter to his superior officer as per Ext.P1 and then he along with other officials proceeded to the K.S.R.T.C. bus station, Thiruvananthapuram, procured two independent witnesses from the premises and kept surveillance. He further stated that he saw a while ambassador car bearing Registration No. KL-01-A-4079 driven by the first accused being parked at the premises and the second accused getting inside the car after a brief conversation and that on questioning them, they admitted the concealment of 5 Kgs. of heroin underneath the front seat of the car. This witness further stated that Exts.P2 and P3 notices were issued to the accused informing them of their right of being searched in the presence of a gazetted officer and that after obtaining their willingness, search was conducted and the contraband articles were seized as per Ext.P5 mahazar. PW.1 further stated that two samples were taken from each packets and sent for chemical analysis. This witness also stated that both the accused gave statements under Section 67 of the N.D.P.S. Act admitting carriage of the drugs and their involvement in the conspiracy in the procurement and transportation of the contraband articles to Sri Lanka. PW.2 was the chemical examiner who gave Ext.P14 chemical analysis report. PW.3 was the Village Officer who prepared Ext.P15 site plan.

PW.4 was an independent witness who stated before the court below that he had accompanied the N.C.B. officials while the seizure was effected. He also stated that it was the first accused who was driving the car and he also identified the second accused as the person who came and got inside the car. This witness further stated that he affixed his signature in Ext.P5 mahazar and on the packets seized by the officials. PW.5 was an N.C.B. official who proved the English translation of Exts.P7 and P8 statements given by the accused persons. PW.6 was the superior officer of PW.1 who had accompanied PW.1 at the time of search and seizure. This witness stated that he had received Ext.P1 information in writing from PW.1. His evidence is in corroboration with the versions given by PWs.1 and 4. PW.7 was the N.C.B. official who continued the investigation and filed the complaint against the accused before the court below.

6. With regard to the contention of the learned senior counsel appearing for the appellants that the prosecution failed to establish the identity of the first accused, it is seen that this argument is based on the fact that in three places in Ext.P5, the name of the first accused is mentioned as Selvaraj instead of Selvakumar. This was explained by PW.1 as a clerical mistake. There is no other evidence or circumstance to conclude that the first appellant, Selvakumar is not the first accused.

Hence, there is no ground to hold that the prosecution has not succeeded in proving the identity of the first accused.

7. Learned senior counsel had raised a further contention that PW.1 had not complied with the provisions of Section 57 of the N.D.P.S. Act. This argument is on the basis of the decision of the Madras High Court reported in **State by Intelligence Officer, NCB South Zone, Madras v. P. Raja Singh, 1994(1) Crimes 990**. In the above judgment, the Madras High Court considered the factual position of investigation of commission of offences punishable under Sections 8, 23, 28 and 29 of the N.D.P.S. Act. In that case the allegation against the investigation was that the Investigating Officer who detected the crime had not reduced in writing the information received by him to his superior officer. It is the duty of the Investigating Officer to write down the information which he received and forward a copy of the same to his immediate superior officer within 48 hours of detection of the crime. In the present case there is clear evidence that on getting the information, PW.1 had conveyed the same to his superior officer, PW.6, as per Ext.P1. Hence, the above judgment is not applicable in this case.

8. The next question to be considered is whether the evidence of

PW.2 and Ext.P14 chemical analysis report can be accepted to find the appellants guilty under Section 21(c) of the N.D.P.S. Act. The main attack on Ext.P14 and the evidence of PW.2 is that PW.2 had stated in his evidence that he had not conducted the quantitative analysis test on the samples received by him as the laboratory was not equipped with for conducting such test. It is stated in Ext.P14 that the sample analysed was crude heroin. PW.2 also admitted that fact when he was cross-examined. In the light of the above fact, the contention of the learned senior counsel is that the charge under Section 21(c) of the N.D.P.S. Act is not attracted as the prosecution had failed to prove that the appellants were in possession of heroin. In this context, learned senior counsel placed reliance on the judgment of this Court reported in **Noushad, K.K. v. Intelligence Officer, Narcotics Control Bureau, I.L.R.2007(2) Kerala 485**. In the above judgment, this Court had taken the view that unless and until the sample is analysed by applying the approved scientific method of quantitative test, it is not possible to find out the purity of the sample analysed. In the above judgment, this Court had considered the notification dated 19.10.2001 issued by the Government of India which gives benefit to the accused while penalty is imposed on them for having been found in possession of narcotic drugs in small quantity, intermediary quantity or commercial quantity, as the case may be. In that judgment,

this Court had also given the reasons for conducting quantitative test basing on the literature of the United Nations Publication on "Methods for Impurity Profiling of Heroin and Cocaine". In the light of the above judgment, the contention of the learned senior counsel assumes relevance. The charge against the appellants was that they were found in possession of heroin whereas as it is stated inExt.P14 chemical analysis report that the sample analysed was crude heroin. Crude heroin contains materials other than heroin. Hence, this Court is not in a position to conclude that the appellants committed offence punishable under Section 21(c)or 21(b) of the N.D.P.S. Act. At the same time, there is evidence to show that the appellants committed the offence punishable under Section 21 of the N.D.P.S. Act. Considering the facts and circumstances of the case, it is only proper for this Court to hold that the appellants committed offence punishable under Section 21(a) of the N.D.P.S. Act.

9. On considering the entire evidence, this Court is of the view that the trial court was justified in finding that the accused - appellants herein were in possession of heroin. That finding is, therefore, confirmed. But, the trial court went wrong in finding that the appellants committed the offence punishable under Section 21(c) of the N.D.P.S. Act as there is no evidence regarding the exact percentage of diacetylmorphine present in the

sample analysed by PW.2. Hence, the appellants can be convicted only under Section 21(a) of the N.D.P.S. Act. In the above circumstances, the conviction entered by the trial court under Section 21(c) of the N.D.P.S. Act is altered to Section 21(a) of the N.D.P.S. Act and the appellants - accused in S.C.No.347 of 2005 on the file of the Special Judge (trial of Cases under the N.D.P.S. Act), Thiruvananthapuram are sentenced to undergo rigorous imprisonment for a period of six months each and to pay a fine of Rs.10,000/- each and in default of payment of fine, to undergo simple imprisonment for a further period of three months each. Further, the prosecution did not adduce any evidence to prove that there was criminal conspiracy between the appellants and one Mohammed from Kasaragod and one Rex from Sri Lanka. Hence, the finding of the trial court that the appellants committed the offence punishable under Section 29 of the N.D.P.S. Act is set aside and they are acquitted of that charge. As the appellants are in custody since 29.10.2004 and they have undergone imprisonment for more than two and a half years , they shall be released forthwith, if they are not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

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